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EUROMA RUBBER IND SDN BHD

v.

UNITED OVERSEAS BANK (M) BHD

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COURT OF APPEAL, PUTRAJAYA
SULAIMAN DAUD JCA
ABDUL WAHAB PATAIL JCA
ZAHARAH IBRAHIM JCA
[CIVIL APPEAL NO: W-02-1099-2009]

C

15 NOVEMBER 2010

CONTRACT: *Liability - Discharge of liability - Claim for goods sold and delivered - Foreign bank issued letter of credit for benefit of purchaser - Whether local bank liable to pay seller under terms of contract - Whether notification of transfer excluded local bank from liability*

D

CONTRACT: *Sale of goods - Payment terms - Agreement to sell goods payable by irrevocable letter of credit at sight - Acceptance of transferable letter of credit by seller in place of irrevocable letter of credit - Whether amounted to abandonment of agreed mode of payment*

E

BANKING: *Documentary credit - Letters of credit - Sale of goods - Payment terms - Agreement to sell goods payable by irrevocable letter of credit at sight - Acceptance of transferable letter of credit by seller in place of irrevocable letter of credit - Whether amounted to abandonment of agreed mode of payment*

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The appellant agreed to sell processed natural rubber to Monefield Sdn Bhd ('first defendant'), payable by an irrevocable letter of credit at sight. Upon issuance of the main letter of credit ('MLC')

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by Bank of China ('MLC issuing bank') for the benefit of the first defendant, the appellant delivered processed natural rubber to Ningbo, China. However, the documents were rejected when presented for payment on the allegation of discrepancies. The cause of action relied upon by the appellant was non-payment

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under the terms of the transferable letter of credit ('TLC') issued by the respondent to the appellant upon an application by the first defendant. The appellant's action against the respondent was dismissed by the High Court and hence this appeal.

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Held (dismissing the appeal with costs)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) The claim against the MLC could only be made by the first defendant who was the beneficiary. What was assigned to the appellant was not the MLC but part of the proceeds from it. In forwarding the documents received from the first defendant, the respondent acted as the advising bank of the MLC issuing bank. Since the first defendant did not receive payment from the MLC issuing bank, the appellant was not entitled to payment. No cause of action could arise against the respondent since the notification of transfer specifically excluded the respondent from liability. (paras 25 & 29)

(2) The respondent's obligation to pay the appellant was under the TLC, where it undertook to pay the amount stated therein to the appellant only upon receipt of the amount under the MLC and on instruction of the first defendant. Since no payment was made by the MLC issuing bank thereunder and there was no evidence before the court to the contrary, no obligation had emerged under the TLC to require the respondent to make payment to the appellant. (para 35)

(3) The sales contracts required payment by irrevocable letter of credit at sight. The appellant, instead of adhering to the terms of the sales contracts, accepted the TLC on its terms when upon the strength of it, it shipped the goods to Ningbo. In accepting the TLC, the appellant abandoned its safe payment model for business through a middleman and exposed itself to having to wait for payment to be first made by the MLC issuing bank in China to the first defendant before being able to receive its payment. In doing so, not only the appellant placed itself in the hands of the first defendant being able to obtain payment under the MLC from the MLC issuing bank, it also accepted that the documents it submitted to the respondent would be forwarded to the MLC issuing bank. (para 38)

Bahasa Malaysia *Translation Of Headnotes*

Perayu bersetuju menjual getah asli yang diproses kepada Monefield Sdn Bhd ('defendan pertama'), dibayar dengan surat kredit tidak boleh batal 'at sight'. Selepas pemberian surat kredit utama ('SKU') oleh Bank of China ('bank pengeluar SKU') bagi

A faedah defendan pertama, perayu telah menghantar getah asli yang diproses ke Ningbo, China. Walaubagaimanapun, dokumen-dokumen tersebut telah ditolak apabila dikemukakan untuk bayaran atas dakwaan percanggahan. Kausa tindakan yang disandarkan oleh perayu adalah kegagalan membayar atas terma-terma surat kredit B boleh dipindah ('SKP') yang dikeluarkan oleh responden kepada perayu atas permohonan defendan pertama. Tindakan perayu terhadap responden ditolak oleh Mahkamah Tinggi dan oleh itu rayuan ini.

C **Diputuskan (menolak rayuan dengan kos)**
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Tuntutan terhadap SKU hanya boleh dibuat oleh defendan pertama yang merupakan benefisiarinya. Apa yang D diletakhakkan kepada perayu bukanlah SKU tetapi sebahagian daripada hasilnya. Dalam mengemukakan dokumen-dokumen yang diterima daripada defendan pertama, responden bertindak sebagai bank penasihat kepada bank pengeluar SKU. Oleh sebab defendan pertama tidak menerima bayaran daripada bank E pengeluar SKU, perayu tidak berhak kepada bayaran. Tidak ada kausa tindakan yang boleh timbul terhadap responden oleh sebab notis perpindahan mengecualikan responden secara spesifik daripada liabiliti.

F **(2)** Tanggungjawab responden untuk membayar perayu adalah di bawah SKP, di mana ia mengaku janji untuk membayar jumlah yang dinyatakan di dalamnya kepada perayu hanya selepas penerimaan jumlah tersebut di bawah SKU dan atas arahan defendan pertama. Oleh sebab tidak ada bayaran dibuat oleh G bank pengeluar SKU dan tidak ada keterangan sebaliknya di hadapan mahkamah, tidak ada kewajipan yang timbul di bawah SKP untuk memerlukan responden membuat bayaran kepada perayu.

H **(3)** Kontrak-kontrak jualan tersebut memerlukan bayaran oleh surat kredit tidak boleh batal 'at sight'. Perayu, di sebalik mematuhi terma-terma dalam kontrak jualan, menerima SKP atas termanya apabila, bergantung atasnya, ia menghantar barangan ke Ningbo. Dalam menerima SKP, perayu I menggugurkan model bayaran yang selamat untuk perniagaan melalui orang tengah dan mendedahkan dirinya dengan

menunggu bayaran dibuat dahulu oleh bank pengeluar SKU di China kepada defendan pertama sebelum bayaran dapat diterima. Dalam berbuat demikian, bukan sahaja perayu meletakkan dirinya dalam tangan defendan pertama bagi membolehkan penerimaan bayaran di bawah SKU daripada bank pengeluar SKU, ia juga menerima bahawa dokumen-dokumen yang dikemukakan kepada responden akan dikemukakan kepada bank pengeluar SKU.

Case(s) referred to:

Amixco Asia Pte Ltd v. Bank Bumiputra Malaysia Bhd [1991] 2 SLR 943 ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Equitable Trust Company of New York v. Dawson Partners Ltd [1927] 27 LI L Rep 49 (HL) ***(refd)***

JH Rayner & Co Ltd v. Hambro Bank Ltd [1943] KB 37 ***(refd)***

KEP Mohamed Ali v. KEP Mohamed Ismail [1980] 1 LNS 169 FC ***(refd)***

Kredietbank NV v. Sinotani Pacific Pte Ltd (Agricultural Bank of China, Third Party) [1999] 3 SLR 288 ***(refd)***

Pavia & Co SPA v. Thurmann-Nielsen [1952] 2 QB 88 ***(refd)***

Seaconsar Far East v. Bank Markazi Jomhouri Islami Iran [1993] 1 Lloyd's Rep 23 CA ***(refd)***

Superintendent Of Lands And Surveys, 4th Division & Anor v. Hamit Matusin & 6 Ors [1994] 3 CLJ 567 SC ***(refd)***

For the appellant/plaintiff - Sri Dev Nair; M/s Sri Dev & Naila
For the respondent/2nd defendant - Lim Siew Ming; M/s Raja Darryl & Loh

[Appeal from High Court, Kuala Lumpur; Comercial Suit No: D3-22-180-1998]

Reported by S Barathi

JUDGMENT

Abdul Wahab Patail JCA:

Introduction

[1] The appellant/plaintiff Euroma Rubber Ind Sdn Bhd ("the appellant") appealed against the 15 May 2009 decision of the High Court dismissing with costs its claim against the respondent/2nd defendant United Overseas Bank (M) Bhd ("the respondent").

[2] The appellant is a seller of processed natural rubber. The appellant agreed to sell to Monefield Sdn Bhd ("the 1st defendant") 230,400 kilograms of processed natural rubber ("the goods") for the sum of US$248,320 to be exported to Ningbo, China and payable by an irrevocable letter of credit at sight, meaning paying the amount at first sight of such letter of credit and the documents required therein.

[3] Upon an application by the buyer in China ("the China buyer"), a letter of credit LC92C0028797 was issued on 20 May 1997 by Bank of China, Hangzou for the benefit of the 1st defendant as beneficiary. This letter of credit is hereafter referred to as the main letter of credit ("the MLC") and the Bank of China as the "MLC issuing bank".

[4] The goods were delivered to Ningbo. When documents were presented to the MLC issuing bank for payment, it rejected the documents, alleging discrepancies. Neither the 1st defendant nor the appellant were paid.

[5] On 15 January 1998, the appellant filed a writ of summons against the 1st defendant and the respondent. The claim against the respondent is based upon a letter of transfer issued by the respondent to the appellant. This is described by the appellant as the transferable letter of credit ("the TLC"). After a full trial, the High Court dismissed the appellant's claim. The appellant appealed to this court.

Submissions And Findings

[6] Learned counsel Sri Dev Nair for the appellant submitted lengthy written and oral submissions, the latter with energy and passion: his client had shipped the goods but received no payment. We set out our summary of his submissions.

[7] The cause of action relied upon by the appellant is non-payment under the terms of the TLC issued by the respondent to the appellant upon an application by the 1st defendant. The argument is that in compliance with the TLC as to the documents required, the appellant had submitted the required documents to the respondent but has not been paid.

[8] The submission then digressed, that the China buyer had used the 1/3 bill of lading to claim the goods in mid July 1997. In the concluding submissions, counsel returned to this fact. It

was argued that the learned judge's decision on 15 May 2009 cannot stand simply because he had failed to give sufficient consideration to the documents as well as failed to appreciate and assess the oral evidence of the parties and in particular to the evidence of the plaintiff which clearly shows that the plaintiff is entitled to its claim on a balance of probabilities. The comment was made that it will be a travesty of justice if the plaintiff is denied its claim for what is duly theirs when it has duly complied with the terms of the TLC and over and above the said compliance; the China buyer had already received the goods and commerce and international trade will breakdown if a supplier who sends off the goods to a foreign party and later is unable to cash in the MLC which has been assured by the negotiating bank. There will not be any trust and security for payment in such a situation. It was also submitted the learned judge had considered irrelevant issues and had not directed his mind to the fact in issue which is the compliance of the parties within the four corners of the "irrevocable transferred letter of credit (between the appellant and the respondent)" which is subject to the Uniform Customs And Practices For Documentary Credit (UCP500), the latter not having even been referred to by the learned judge.

[9] While it is true the learned judge did not refer to the Uniform Customs and Practices of Documentary Credit 500 (UCP 500), it is nevertheless obvious from the judgment that the learned judge dealt with the case as involving payment under a letter of credit, recognised the principle of strict compliance in letters of credit and that a letter of credit is an undertaking by the bank that issues it to pay upon production of the documents specified therein. It goes without saying that the bank is not concerned with the trade and goods it cannot be expected to be familiar with. It is not concerned with disputes between the buyer and the seller of the goods. It is only concerned with strict compliance by production of the documents specified in the letter of credit before it releases payment, for if it does not, it risks not being indemnified or reimbursed by the buyer. Thus, letters of credit are also known as documentary credits.

[10] The issuing bank of a letter of credit has the right to refuse payment upon any discrepancy appearing on the face of documents submitted, or any departure from the terms of a letter of credit as it would risk dispute and non-indemnification by the buyer. The issuing bank exercises sole discretion whether to seek

A the buyer's acceptance of any discrepancy so as to make payment or to reject the discrepant documents and refuse to make payment (art. 14c UCP 500). The doctrine of strict compliance was first established in *Equitable Trust Company of New York v. Dawson Partners Ltd* [1927] 27 Ll L Rep 49 (HL), where Viscount B Sumner, speaking on a claim for indemnity by a bank that had paid out to the seller under a letter of credit, put it this way:

> ... There is no room for documents which are almost the same, or which will do just as well ... If a bank does as it is told, it is safe; if it declines to do anything else, it is safe; if it departs from C the conditions laid down, it acts at its own risk ...

[11] The doctrine is illustrated in *JH Rayner & Co Ltd v. Hambro Bank Ltd* [1943] KB 37 where the Court of Appeal held the bank was entitled to reject the documents and refuse payment D even though it was well known in the trade that "coromandel groundnuts" and "machine-shelled groundnuts" are one and the same:

> It was quite impossible to suggest that a banker is to be affected E with knowledge of the customs and customary terms of every one of the thousands of trades for whose dealings he may issue a letter of credit.

[12] In *Seaconsar Far East v. Bank Markazi Jomhouri Islami Iran* [1993] 1 Lloyd's Rep 23 CA, the letter of credit stipulated, F *inter alia*, that all documents presented to the bank should carry the credit number and the buyer's name. One of the documents tendered omitted to state the credit number and the buyer's name. The Court of Appeal held that the tender was bad. Lloyd LJ said:

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> [The plaintiff's counsel] argues that the absence of the letter of credit number and the buyer's name was an entirely trivial feature of the document. I do not agree. I cannot regard as trivial something which, whatever may be the reason, the credit specifically requires. It would not help, I think, to attempt to H define the sort of discrepancy which can properly be regarded as trivial. But one might take, by way of example, *Bankers Trust Co v. State Bank of India* [1991] 2 Lloyd's Rep 443 where one of the documents gave the buyer's telex number as 931310 instead of 981310. The discrepancy in the present case is not of that I order.

[13] It was argued in *Seaconsar Far East v. Bank Markazi Jomhouri Islami Iran (ibid)* that even if the discrepancy cannot be regarded as trivial, it can be cured by reference to the other documents such as the certificate of inspection and the certificate of quality. Lloyd LJ had this to say:

> I do not see how Bank Melli could ignore that requirement. It may be that the *proces verbal* in fact related to the same goods, and that one can see this by inference from the other documents. But the absence of the letter of credit number and the name of [the buyer] on the *proces verbal* called for some explanation. The bank was therefore entitled to reject ... To hold that it is even arguable that the documents as presented were a valid tender under the credit would, I suspect, cause surprise among bankers, and risk upsetting the ordinary course of business. In my judgment the tender was clearly bad.

[14] Article 14b of UCP500 provides that the issuing bank may refuse to honour payment if documents appear on their face not to be in compliance. It is discretionary. It is the bank's sole discretion because if it pays, it runs the risk of not being reimbursed by the buyer. To avoid risk of not being reimbursed or indemnified, and holding goods it does not know what to do with, it is entitled to demand strict compliance.

[15] The above authorities serve also to show that a single non-compliance is sufficient ground for rejection of the documents submitted to claim payment under a letter of credit. In the system of letter of credits, a beneficiary desirous of receiving prompt payment solely carries the responsibility to comply. In *Pavia & Co SPA v. Thurmann-Nielsen* [1952] 2 QB 88, Lord Denning LJ commented as follows:

> The sale of goods across the world is now usually arranged by means of confirmed credits. The buyer requests his banker to open a credit in favour of the seller, and in pursuance of that request the banker, opens the credit in favour of the seller. This credit is a promise by the banker to pay money to the seller in return for the shipping documents. Then the seller, when he presents the documents, gets paid the contract price. The conditions of the credit must be strictly fulfilled otherwise the seller would not be entitled to draw on it.

[16] It was submitted since there was no dispute between the 1st defendant and the respondent, and likewise between the respondent and the appellant as to the contents, value, quality and technical specifications of the said goods as stated in the

MLC and the TLC, and since the appellant was never a party to the MLC, it followed that for purposes of the plaintiff's cause of action against the respondent, the applicable document is the TLC and all other contemporaneous documents relating to the appellant, the 1st defendant and the respondent only. In other words, the appellant's claim against the respondent and the 1st defendant is under the TLC. The appeal against the 1st defendant is not pursued by the appellant.

[17] In our view, the only avenue open to the appellant who has no privity of contract with either the China buyer or the MLC issuing bank, is against the 1st defendant under their sale and purchase agreement and the respondent under the TLC.

[18] It was suggested that in dismissing the appellant's claim the learned judge erred in relying upon six discrepancies since the three discrepancies raised by D2 on 23 June 1997 based on the TLC had been corrected by 25 June 1997. Only three discrepancies remained but these were raised by the MLC issuing bank on 8 July 1997 based on the MLC. It was argued that the 23 June 1997 discrepancies listed by D2, corrected by 25 June 1997, means the appellant had complied with the terms of the TLC, and the expiry date of 28 June 1997 under the TLC had passed by the time the 8 July 1997 discrepancies were raised by the MLC issuing bank.

[19] Setting out that there had been six discrepancies raised is a far cry from relying upon them all. Reading the judgment of the learned judge, it is evident the learned judge was aware that the MLC had raised three discrepancies while the respondent had raised the other three.

[20] It was argued "It is crucial to note that at all times [the MLC issuing bank] had not rejected the said documents." We see no merit in this submission. The cryptic words "Holding Docs At Yr Disposal" in the 8 July 1997 telex from the MLC issuing bank is refined language expressing clear and unequivocal rejection of the documents. It is the language of the best advocacy.

[21] In forwarding the required documents of the 1st defendant to obtain payment under the MLC, the respondent acted as advising bank only. As such the respondent had no right to disagree with the MLC issuing bank when the latter rejected the documents submitted by the 1st defendant through the respondent.

[22] It was submitted that if the respondent is an advising bank only, it should not have examined the documents when it received the same on 20 June 1997 but should have forwarded the same immediately, and since the documents were forwarded only on 25 June 1997, there was a five-day delay caused, which misled the appellant to believe that the documents are in order and prevented the appellant from being able to present rectified documents to BOC within the expiry date of the MLC. It was urged upon us that by examining the documents and listing out the discrepancies on 23 June 1997, which the respondent should not have done as an advising bank, the respondent had:

(a) Delayed dispatch of documents to the issuing bank.

(b) Misled the appellant to believe that the documents are otherwise in order.

(c) Prevented the appellant from being able to rectify the documents of the discrepancies as alleged by the issuing bank, which ought to have been relayed by the respondent to the appellant within the expiry date and the presentation period.

[23] Following through from the above, it was argued that it brought the consequences that:

(a) the respondent did not exercise reasonable care to protect the interest of the appellant, the beneficiary under the TLC;

(b) the respondent failed to take reasonable care to protect the interest of the plaintiff as against the issuing bank for:

(i) Not complying to the requirements in UCP 500 namely Article 14d and 14e to refuse the respondent's alleged discrepancies on 8 July 1997 thereby precluding the respondent from claiming that the documents are not in compliance with the terms of credit.

(ii) Wrongly refusing to pay the plaintiff under the TLC.

(iii) Not taking the initiative to reject the discrepancies listed by the respondent on 8 July 1997 and demand for reimbursement under UCP 500 Article 9a – Bank to Bank reimbursement.

(iv) Delaying the forwarding of the alleged discrepancies listed by the respondent to the plaintiff knowing very well that under the TLC, the expiry date was 28 June 1997.

[24] Furthermore, it was submitted, that since the respondent had examined the documents presented by the appellant on 20 June 1997 and advised a set of discrepancies to the appellant on 23 June 1997 which the appellant duly rectified, the action of the respondent estopped the MLC issuing bank from raising new discrepancies later since an issuing bank has only one bite at the cherry (see *Amixco Asia Pte Ltd v. Bank Bumiputra Malaysia Bhd* [1991] 2 SLR 943). The submission continued with the argument that the MLC issuing bank telex of 8 July 1997 should have been rejected by the respondent under art. 14d(i) of UCP500 as it was later than seven days and after seven days art. 14e precludes an issuing bank from claiming that documents are not in order.

[25] The submission, upon close examination, shows itself to be founded upon the notion that the appellant is making such claims against the MLC issuing bank through the respondent. In our view, the notion is flawed. The claim against the MLC can only be made by the 1st defendant who was the beneficiary. What was assigned to the appellant was not the MLC but part of the proceeds from it. In forwarding the documents received from the 1st defendant, the respondent acted as the advising bank of the MLC issuing bank.

[26] The MLC issuing bank sent the MLC to the respondent with instructions to notify the beneficiary. This is the practice in cross-border or international letters of credit. The beneficiary, so far as the MLC issuing bank was concerned, was the 1st defendant, not the appellant. The respondent's role therefore began as the advising bank, to inform the 1st defendant of the letter of credit that was issued. It is the advising bank of the MLC issuing bank, not of the 1st defendant and certainly not of the appellant. The nature and role of an advising bank was described in *Kredietbank NV v. Sinotani Pacific Pte Ltd (Agricultural Bank of China, Third Party)* [1999] 3 SLR 288 as follows:

> ... the advising bank is not a party to the credit and has therefore undertaken none of the obligations of the credit to pay. The letter of credit may stipulate that the documents are to be presented to this advising bank for forwarding to the issuing bank. The advising bank normally acts also as the channel through which the issuing bank pays the beneficiary under the credit. If no payment is forthcoming from the issuing bank, the only recourse open to the beneficiary is against the issuing bank and not the advising bank, because at no stage has the advising bank added its own independent undertaking to pay under the credit.

[27] Therefore it is not for the respondent or the appellant but the 1st defendant to respond to the rejection of the documents by the MLC issuing bank, for it is the 1st defendant who was seeking payment. And if the terms of the TLC that the respondent must first receive the funds of the 1st defendant means that the appellant cannot obtain timely payment, that issue is with the 1st defendant under the sale and purchase between the appellant and the 1st defendant and not the respondent under the TLC.

[28] The respondent in this case had a second role. The respondent had issued the TLC dated 30 May 1997 to advise or notify the appellant that the 1st defendant as transferor had instructed transfer to the appellant as transferee the amount of US$248,832 in a partial transfer from the letter of credit. It was specifically noted:

> Without any responsibility on our part and as instructed by [DL] on 29.5.97 that he/they has/have irrevocably transferred to you a part of his/their rights in the [LC] dated 20.5.97 issued by Bank of China Hangzhou and we hereby notified you of the following documents presented under this letter of transfer will be associated with transferor's documents for sending to the LC issuing bank for payment. Upon receipt of payment from the issuing bank and credited to our account with depository bank, we shall effect payment to you as instructed.
>
> Please note that this LC (SIC) is solely an advice and conveys no engagement by us and also note that any amendments to this credit shall be advised to you only upon and in accordance with the instructions which we receive from the original beneficiary.

[29] Since the 1st defendant did not receive payment from the issuing bank the appellant was not entitled to payment. No cause of action can arise against the respondent since the notification of transfer above specifically excluded the respondent from liability.

[30] They became an issuing bank for the 1st defendant when upon its application the respondent issued the TLC to the appellant. This is recognised by the appellant in para. 7 of its statement of claim. When the respondent examined the documents submitted to it by the appellant on 20 June 1997, it was for the purpose of the TLC and was within its rights to notify the appellant on 23 June 1997 the discrepancies it found, and which was corrected by the appellant. Having done so, the respondent

cannot have a second bite by relying on discrepancies identified by the MLC issuing bank. But that cannot by any means operate to estop the MLC issuing bank from exercising its own right to examine the required documents under its MLC and to decide whether to accept or reject the documents submitted to it through its advising bank on 25 June 1997.

[31] It was also submitted that the three discrepancies raised by the MLC issuing bank are in fact not discrepancies. We set out below the telex by the issuing bank dated 8 July 1997:

> Transaction Reference Number: 20: LC92C0028797
>
> Related Reference: 21 : 248BC973055
>
> Narrative: 79 : AMT: USD284-544.00 DO
>
> 25 Jun 97
>
> With reference to the captioned item docs received and found the following discrepancies:
>
> 1. Contract no. Shown on standard malaysian rubber certificate differ from other documents
> 2. Standard malaysian rubber certificate presented i/o quality certificate
> 3. Total quantity shown on standard malaysian rubber certificate and invoice is different
>
> Holding docs at yr disposal
>
> Should the discrepancies be accepted by appl and we have not received yr contrary instruction
>
> Payment will be effected at maturity as per yr original instructions stp.

[32] Arguably the discrepancies may be explainable on the basis that the appellant's documents to the respondent under the TLC may differ from that of the 1st defendant to the MLC issuing bank, and therefore not relevant to the examination of the required documents submitted under the MLC, and certification by the Rubber Research Institute of Malaysia is equivalent to a "Public Recognised Surveyor". But if so, the explanation should have been given by the 1st defendant to its buyer in China so that it may instruct the MLC issuing bank to accept the documents.

[33] Indeed the telex of 8 June 1997 by the MLC issuing bank ended with a clear statement suggesting the 1st defendant to obtain the agreement of the China buyer to accept the documents:

> Should the discrepancies be accepted by appl [applicant] and we have not received yr [your] contrary instruction payment will be effected at maturity as per yr [your] original instructions stp [stop].

[34] The appellant's bank, Bank Bumiputra Malaysia Bhd on 25 August 1997 that "We have been confirmed *(sic)* by our customer, M/s Euroma Rubber Ind Sdn Bhd that their client in China, M/s China National Foreign Trade Corp., has accepted the trade documents (even though with discrepancies) and successfully accessed to the merchandise". The evidence before the court does not support the statement that the China buyer is the appellant's client. If the China buyer did obtain access to the goods, then it is for the 1st defendant to pursue its claim against the MLC issuing bank or alternatively the China buyer. Be that as it may, the decision to reject the documents was made by the MLC issuing bank and not the respondent. If the MLC issuing bank or the buyer in China acted wrongly, it is the 1st defendant who has a cause of action against the MLC issuing bank and that buyer, not the appellant against the respondent whose role is an advising bank in respect of the MLC.

[35] The respondent's obligation to pay the appellant is under the TLC, where it undertook to pay the amount stated therein to the appellant only upon receipt of the amount under the MLC and on instruction of the 1st defendant. Since no payment was made by the MLC issuing bank thereunder and there is no evidence before the court to the contrary, no obligation had emerged under the TLC to require the respondent to make payment to the appellant.

[36] It was submitted that the learned judge had erred in deciding that the failure of the plaintiff to plead delay in the statement of claim on the part of the respondent bank in relaying Bank of China's first notification of the discrepant documents to the plaintiff is fatal. The ground of objection is that the issue of delay was raised by way of an objection by the respondent's

counsel during the proceedings in open court and the learned judge had upon hearing submissions for the parties overruled the objection and permitted proceedings to continue and allowed evidence from both parties to be adduced in relation to the delay issue. It is submitted it is not proper and wholly unfair for the court at the submission stage to resile from its earlier stand, and it is certainly not proper for the respondent being the bank bound by the articles of UCP 500 to raise this pleading point as it is provided for in UCP 500 that documents ought to be forwarded to the beneficiary of the TLC within seven days. Thus it was argued, it is not possible for the respondent to raise the delay issue to overcome its strict obligations under the TLC which has expressly bound the respondent by virtue of the articles of UCP 500.

[37] It can be seen from the notes of proceedings that both parties had ample opportunity to give evidence on the issue of delay. There is, under these circumstances, no surprise nor any prejudice occasioned because the very documents before the learned judge are agreed upon and the delay factor is an inference that can be drawn upon from the said agreed documents and in particular the articles of UCP 500. Once the evidence had been let in, the learned judge ought to have sifted through the evidence on the delay on the part of the respondent, which circumstances leading to the delay has been admitted by the respondent's witness. *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; *Superintendent Of Lands And Surveys, 4th Division & Anor v. Hamit b Matusin & 6 Ors* [1994] 3 CLJ 567; *KEP Mohamed Ali v. KEP Mohamed Ismail* [1980] 1 LNS 169. But the issue is not material for the party to respond to the telex by the MLC issuing bank is the 1st defendant, and not the appellant or the respondent.

[38] We addressed our minds to an examination of what went so wrong. We find that the sales contracts of 6 May 1997 and 28 May 1997 required payment by irrevocable letter of credit at sight. An irrevocable letter of credit at sight is one in which an issuing bank authorizes a seller of goods to present documents of title for payment, without a bill of exchange or with a bill of exchange drawn on it payable at sight, to the bank issuing the credit or depending on the arrangement adopted, and its correspondent undertakes to pay the seller, or reimburse its correspondent upon

the correspondent paying the seller, against the documents presented. Instead of adhering to the terms of the sales contracts, the appellant accepted the TLC on its terms when upon the strength of it, it shipped the goods to Ningbo. In accepting the TLC the appellant abandoned its safe payment model for business through a middleman and exposed itself to having to wait for payment to be first made by the MLC issuing bank in China to the 1st defendant before being able to receive its payment. In doing so, not only the appellant placed itself in the hands of the 1st defendant being able to obtain payment under the MLC from the MLC issuing bank, it also accepted that the documents it submitted to the respondent would be forwarded to the MLC issuing bank.

[39] The key to success in the use of letters of credit is to keep the terms of compliance to the absolute minimum necessary and as simple as possible. One should not open oneself, after the goods have been shipped, to needing the agreement of the buyer to accept discrepancies, because business conditions may change and an eager buyer may regret his purchase or want to take the opportunity to obtain further discount.

[40] As much as anyone may sympathise with the predicament of the appellant, the decision in this appeal is inevitable. We dismissed the appeal with costs.